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May 9, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 22, 2004**

Case No.: **TIA-0225**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. *See* 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the

Physician Panel Rule). The OWA was responsible for this program.[1]

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* §3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* §3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant was employed as a laborer, an auto mechanic, and a truck driver at the Rocky Flats Plant (the plant). In his application, he stated that he worked at the site for a total of 23 years -- from 1969 to 1992. He requested physician panel review of "colon cancer." The OWA forwarded the application to the Physician Panel.

The Physician Panel rendered a negative determination on colon cancer. The Panel remarked that the Applicant had radiation exposure, but that exposure was not enough to be a significant factor in his illness. The Panel stated that the Applicant had a genetic disposition to the disease.

[1] www.eh.doe.gov/advocacy

The OWA accepted the Physician Panel's determination on the illness. The Applicant filed the instant appeal.

In his appeal, the Applicant states that his exposures at the plant accelerated the onset of his colon cancer. He states that his exposure records are incomplete, citing the absence of radiation exposure data for his first two years at the plant. The Applicant also states that he has consulted numerous physicians who remarked that his exposures (radiation and chemical) at the plant could have increased his susceptibility to colon cancer.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant's argument that the record does not contain radiation exposure data for the first two years of his employment does not indicate Panel error. The Panel bases its decision on the record, and we do not see any indication that the record is incomplete. The OWA asked the plant to provide relevant records. Record at 6, 7. The plant responded to that request, and we have no reason to believe that the plant's response was inadequate or that OWA somehow misplaced the records. It may be that radiation exposure was not measured in the first two years of the Applicant's employment or that the plant did not retain the records.

Similarly, the Applicant's argument that his physicians have stated that his exposures to radiation could have increased his susceptibility to colon cancer does not indicate Panel error. As an initial matter, we note the absence of any such physician statements in the record. More importantly, the Panel Rule requires a closer nexus between exposures and an illness. The

Panel Rule does not provide for a positive determination where an exposure "could" be a factor; instead, the Panel Rule requires that it be "at least as likely as not" that the exposure "was a significant factor in aggravating, contributing to or causing the illness." 10 C.F.R. § 852.8. Accordingly, evidence that an exposure "could" have increased susceptibility to an illness does not satisfy the standard set forth in the Panel Rule.

Finally, we note that the Applicant filed a Subpart B claim, and that the DOL referred the application to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction. *See* Record at 17. If the Applicant believes that the results of the NIOSH dose reconstruction support his claim, he should raise the matter with the DOL.

In compliance with Subpart E, this claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on Subpart E claims. The OHA's denial of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0225 be, and hereby is, denied.

(2) This denial pertains only to the DOE appeal and not to the DOL's review of this claim under Subpart E.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 9, 2005